No. 94-1044

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

GREGORY BERRY, PHILLIP MARCUS,
DENNIS MCALLISTER and FRANCES ORAVETZ,
Petitioners,

VS.

COUNTY OF SONOMA,
SONOMA COUNTY SHERIFF'S DEPARTMENT,
SONOMA COUNTY BOARD OF SUPERVISORS,
JANET NICHOLAS, JAMES HARBERSON, TIM SMITH,
NICK ESPOSITO, ERNEST CARPENTER,
and RICHARD MICHAELSON,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeal
For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that Petitioners were not entitled to overtime compensation under the Fair Labor Standards Act for time spent on-call, but not actually working, because they could effectively use such time for a wide variety of personal pursuits, including sleeping, reading, watching TV, doing some household chores, going out to dinner, and engaging in other employment?

2. Can a fact-finder attempting to determine whether on-call time is compensable under the Fair Labor Standards Act consider whether the plaintiffs seeking compensation and their authorized collective bargaining representatives treated the time so spent as work?

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Respondents County of Sonoma, et al., respectfully request the Court to deny the petition for certiorari seeking review of the Ninth Circuit's decision in this case.

INTRODUCTION

The Ninth Circuit in this case held that Petitioners, four coroners employed by the County of Sonoma, were not entitled to overtime compensation under the Fair Labor Standards Act (FLSA) for time spent on-call but not actually working. It based this ruling in large part on the District Court's finding that Petitioners have engaged in a wide variety of personal pursuits while on-call, including using on-call time to engage in secondary employment. The Court of Appeals also held—again, based on the findings of the District Court—that Petitioners and their employee association had acquiesced for many years in the County's overtime policy, thus indicating through their conduct that they did not consider on-call time to be compensable work.

The Court of Appeals did not reweigh the evidence heard by the District Court. Instead, it held that the District Court's own findings did not meet the test for on-call compensability set forth in *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992). The Ninth Circuit therefore held that *Owens* compelled entry of judgment in the County's favor.

Petitioners do not contend that *Owens* conflicts with the decisions of other Circuits, doubtless because there is no such conflict. They do not even contend that *Owens* is wrong, thus tacitly recognizing that *Owens* conforms to the cases and regulations interpreting the FLSA. Indeed, the petition does not even mention *Owens* at all, even though that decision sets forth the legal framework used by the Court of Appeals in deciding this case.

Instead, Petitioners attempt to manufacture conflicts between the decision below, on the one hand, and Rule 52(a) and the decisions of this Court, on the other. But none of their arguments justifies granting the writ. This

Court set forth the rules governing the application of Rule 52(a) to FLSA cases in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), which holds that whether a given set of facts constitutes an FLSA violation is an issue of law. Accordingly, there is no need for this Court to revisit that issue in this case. Moreover, in holding that the facts found by the District Court were insufficient to require compensation under *Owens*, the decision below simply applied *Icicle Seafoods*'s holding that whether a particular set of facts triggers the FLSA's requirements is a legal issue, not a factual one.

Because *Icicle Seafoods* sets forth the relevant legal principles, there is no conflict in the Circuits as to whether on-call compensability is an issue of fact or law. The cases cited by Petitioners do nothing more than apply well-settled procedural rules (governing summary judgment and the like) to FLSA cases. And Petitioners' argument that on-call compensability *should* be treated as an issue of fact, rather than law, would lead to unpredictability and balkanization of federal law in an area where the Court has stressed the importance of uniform national standards.

Petitioners' waiver argument similarly rests on a misreading of the decision below. They say that this case raises the issue of whether Petitioners' FLSA rights were waived in a collective bargaining agreement. But the decision below does not even mention waiver, much less hold that a waiver had occurred. Instead, the Ninth Circuit simply held that agreements between the parties are relevant—but *not* dispositive—in close FLSA cases involving on-call time, because such agreements indicate whether the parties treated on-call time as work. This ruling, too, fully accords with this Court's cases and the applicable FLSA regulations, and thus presents no issue worthy of review.

STATEMENT OF THE CASE

The first portion of the Petition's Statement of the Case (Pet. 4-5) omits several key facts regarding the duties of coroners and their ability to engage in numerous personal

activities while on-call. It also fails to describe the coroners' acceptance of the County's overtime policy. A more balanced statement of the facts appears in the Ninth Circuit's opinion. *See* Pet. App. at 2a-5a.

As the Ninth Circuit's decision indicates, the County's on-call policy does not prevent Petitioners from using their on-call time to engage in a wide variety of personal activities. *Id.* at 4a. Indeed, the District Court specifically found that Petitioners "could sleep, read, watch television, do some household chores, go out to dinner or a movie, while on-call." *Id.* at 51a. The District Court also found that:

> "[D]eputy coroners have been able to have other employment or businesses while on-call. [Petitioner] Berry taught classes at a local community college and answered calls for a volunteer fire department of which he was Battalion Chief, while on-call. Siebe, when he was a deputy coroner, had a firewood business and a machine shop business." (*Id.* at 50a-51a)

The coroners had the freedom to engage in these activities while on-call because they were subject to only modest geographical and time-related restrictions. To begin with, Petitioners did not have to conduct on-call investigations from the Coroner's Office. *Id.* at 31a ("on-call investigations were usually handled from outside the Coroner's Office, most often the coroner's home"). Instead, while on-call Petitioners could go anywhere within Sonoma County (which has an area of 1,600 square miles), as long as they were within fifteen minutes of a telephone or a two-way radio (which the County provided). *Id.* at 42a-43a.

This geographical flexibility was possible because "there was no explicit response time required for a coroner to report to the scene of a death, and there was no specific response time to initiate a telephone investigation of a

coroner's case . . . ." *Id.* at 34a.[1] Indeed, "most of [Petitioners'] on-call responsibilities could be handled by telephone . . . ." *Id.* at 51a. The District Court therefore concluded that "there was no 'time limit leash' restricting [Petitioners'] movements" while on-call. *Id.*

With respect to the existence and provisions of agreements between the parties, the District Court focused almost exclusively on the County's decision in 1982 to give the investigators a 5% premium in their base salary while it simultaneously eliminated the pre-existing practice of paying the coroners 5% of their hourly rate for each hour of on-call standby time. *Id.* at 55a-56a. The court found that the "evidence was strong that [the 5%] premium pay represented compensation for expertise, not for being on-call." *Id.* at 55a. However, the District Court also acknowledged that the issue of on-call compensation had been repeatedly discussed during collective bargaining negotiations between the parties (*id.* at 59a) and that these negotiations resulted in "a resolution several times" to deny on-call compensation (*id.* at 63a). The District Court also found that "each [Petitioner] understood the requirements of the job before he applied for and accepted the position." *Id.* at 53a.

Despite these findings—which Petitioners largely ignore—the District Court granted judgment for the County. On appeal, the Ninth Circuit reversed, relying on *Owens v. Local No. 169, Ass'n of Western Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992). In *Owens*, which was decided after the District Court issued its decision in this case, the Ninth Circuit identified "two predominant factors in determining whether an employee's on-call waiting time is compensable

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[1]A "coroner's case" is a death report that requires either telephonic or on-the-scene investigation by a coroner. RT 43:15-45:13. In contrast, a "no-case" involves a hospital or physician-attended death in which all the coroner has to do is take basic information over the telephone, assign a case number, fill out a form, and close the case. RT 51:5-54:25. More than two-thirds of all death reports involve "no-cases." *See* Ex. 33.

overtime . . . '(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties.'" Pet. App. 6a (quoting 971 F.2d at 350). With respect to the first factor, moreover, *Owens* sets forth an "illustrative, non-exhaustive" list of seven issues "to be analyzed in determining the degree to which an employee is free to engage in personal activities while on-call." Pet. App. 12a (citing 971 F.2d at 351).[2] Yet the Petition does not even cite *Owens*, notwithstanding the Ninth Circuit's holding that "*Owens* controls our decision in this case." Pet. App. 6a.

In so holding, the Ninth Circuit did not reweigh the evidence heard by the District Court. Instead, it took the factual findings made by the District Court and evaluated them according to the legal framework set forth in *Owens*. In each instance, the Court of Appeals held that the District Court had reached the wrong result because it evaluated the facts under the wrong legal standard and that, under the correct legal standard, the factual findings made by the District Court required judgment for the County.

First, and most importantly, the Court of Appeals held that the District Court had applied the wrong legal standard to the evidence bearing on Petitioners' ability to use on-call time for their own purposes. As the Ninth Circuit recognized, the District Court had found that Petitioners' on-call time was compensable "because they cannot pursue certain

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[2]The seven factors listed in *Owens* are as follows:

> "(1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time." (971 F.2d at 351 (footnotes omitted))

personal activities." Pet. App. 16a. It then quoted a lengthy passage from the trial court's opinion, where the lower court had listed all the activities Petitioners testified could not be done on call. Pet. App. 16a-17a (quoting Pet. App. 51a). The Court of Appeals then held that the District Court had reached the wrong result because it had asked the wrong question:

> "The inquiry, however, is not whether the coroners are prevented from participating in certain personal activities, but whether they actually engage in personal activities during on call shifts. . . . [A]n employee need not have 'the same flexibility or freedom as he would if not on call' to engage in personal activities in order to conclude that he can use on-call time effectively for his own purposes. Although the coroners are unable to engage in certain pursuits, it is undisputed that while on-call coroners have actually been able to socialize with friends and family, dine out, shop, read, watch television and enjoy hobbies such as gardening, working on antique cars, leather crafts and photography. Also, two coroners actually held secondary employment." (Pet App. 17a (citations omitted))

As this quotation reveals, in reversing the District Court the Ninth Circuit simply applied a different legal gloss to the District Court's findings. The lower court had found that the coroners "could sleep, read, watch television, do some household chores, go out to dinner or a movie, while on-call." Pet. App. 51a. In addition, the court also found that two coroners (Berry and Siebe) had secondary employment while on-call (Pet. App. 51a), and stated specifically that Berry's ability to teach while on-call "tends to undermine [Petitioners'] position." Pet. App. 45a. Yet the lower court found on-call time compensable because it mistakenly focussed on what Petitioners could *not* do, as opposed to what they could. The Court of Appeals simply corrected this legal error.

The same is true with respect to the coroners' response time. Pet. 8. Here, too, the Court of Appeals accepted all the factual findings that the District Court made concerning the time within which Petitioners are required to respond to death reports. Pet. App. 14a. It therefore acknowledged the District Court's findings that: (1) "there was no explicit response time required for a coroner to report to the scene of a death" (Pet. App. 14a, 34a); (2) "there was no specific response time to initiate a telephone investigation of a coroner's case" (Pet. App. 14a, 34a); and (3) that the coroners' actual practice is to initiate investigations "as soon as possible." Pet. App. 14a, 34a. Consequently, the Ninth Circuit did not reweigh the evidence before the District Court; instead, it simply compared the District Court's findings on this issue to the comparable findings set forth in other cases, and concluded that the restrictions imposed on Petitioners in this case were less onerous than those imposed in numerous cases in which compensation had been denied. Pet. App. 14a-15a.[3]

The Ninth Circuit similarly applied its own legal analysis to the District Court's findings regarding the use of pagers. The lower court had found that while "[u]se of an electronic pager may lessen restrictions on an on-call employee by making it possible for the employee to be away from a telephone or two-way radio" (Pet. App. 40a), the pagers available to the Petitioners "were not 100% reliable and so their benefit, if any, to [Petitioners] was only

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[3]As the Ninth Circuit stated, on-call compensation has been denied in several cases where the employees were required to report to the employer's premises within approximately twenty minutes. Pet. App. 14a-15a (citing *Armitage v. City of Emporia*, 982 F.2d 430, 432-33 (10th Cir. 1992); *Bright v. Houston Northwest Medical Ctr. Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991), *cert. denied*, –U.S.–, 116 L. Ed. 2d 786 (1992); *Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653, 654 (10th Cir. 1988)). In contrast, "[i]n this case, the only required response time is fifteen minutes to answer a page or telephone call, not in person or at the employer's premises, but by telephone or two-way radio. This required response is substantially different than being required to return to the employer's premises within twenty minutes." Pet. App. 15a.

partial." Pet. App. 41a. However, the Court of Appeals held that "the proper inquiry is 'whether use of a pager [can] ease restrictions,' not whether the pager is 100% reliable." Pet. App. 15a (citation omitted). Since the coroners could voluntarily use a pager in those areas of the county where they *were* reliable, the pagers enabled "them to more easily pursue personal activities." Pet. App. 15a.[4]

The Ninth Circuit also found that the District Court had used the wrong legal standard in analyzing the evidence relating to trading shifts. As with the pagers, the Ninth Circuit acknowledged the District Court's findings that: (1) "in actual practice, the [coroners] seldom voluntarily traded on-call shifts" (Pet. 15a, 45a); (2) "the primary reason for seldom trading was the coroners' 'unwillingness to impose on each other's off-duty time'" (Pet. App. 15a, 45a); and (3) "with so few coroners, there was little to be gained by trading on-call time" (Pet. App. 15a, 45a). But the Ninth Circuit found that the District Court had failed to analyze this evidence properly:

> "The proper inquiry is 'whether the on-call employee [can] *easily* trade on-call responsibilities.' There is no evidence that the coroners are unable to trade shifts or have had difficulty at any time trading shifts. . . . The fact that coroners seldom are willing to impose upon one another's off-duty time does not mean they cannot easily trade shifts

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[4]Petitioners charge that the Ninth Circuit "did not address the District Court's finding that three of the four plaintiffs were unable to use pagers because of their geographic location and the pagers' unreliability." Pet. 8. The "cf." cite that follows this sentence is a tacit acknowledgement that the District Court made no such finding. Instead, the court found only that the pagers "were not reliable in all areas of the County, including the areas near *two* of the [Petitioners'] homes." Pet. App. 43a (emphasis added). The pages cited in the Petition (Pet. App. 40a-41a) merely summarize the testimony on this issue presented by plaintiffs and the contrary evidence that the County presented showing that the pagers were not as unreliable as Petitioners contended.

if they seek to trade." (Pet. App. 15a-16a (citation omitted))

Here, again, the Court of Appeals did not reweigh the evidence found by the District Court, but simply relied on the lower court's findings that coroners traded shifts "on special occasions," such as "to attend a child's school graduation or . . . while teaching a class." Pet. App. 44a, 45a.[5]

Finally, the Ninth Circuit held that "the agreements between the parties" supported reversal of the District Court's decision. Pet. App. 7a-11a. Contrary to Petitioners' summary, however, the Court of Appeals did not focus exclusively on the collective bargaining agreement between the County and Petitioners' bargaining representative. Instead, it identified "three different types of agreements between the employer and employees which may be relevant to the issue of on-call compensation." Pet. App. 7a. These include applicable collective bargaining agreements, a constructive agreement if employees are informed of the overtime compensation policy, and an express agreement if the employees voluntarily accept the

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[5]Petitioners assert that the Ninth Circuit made a finding that "[t]he frequency of calls [received by the coroners] was one per 6.45 hours on call." Pet. 7. They then say that this purported finding unjustifiably ignored the District Court's finding that the statistics kept by the parties "understated the actual frequency of calls." *Id.* at 8. But the Ninth Circuit did not make the finding Petitioners attack. Instead, the Court of Appeals found only that the coroners "receive a *death report* . . . once every 6.45 hours." Pet. App. 18a (emphasis added). Thus, this finding concerns death reports, while the District Court's finding concerned the total number of calls received by the coroners. Consequently, there is no contradiction between the two findings.

The District Court did make its own finding on the frequency of death reports, which it found to average one every four hours. Pet. App. 37a ("average frequency of calls *requiring a coroner to respond by telephone* while on-call was one per 4 hours on-call") (emphasis added). The Ninth Circuit found this finding "implausible," because it contradicted statistics agreed to by the parties. Pet. App. 18a n.8. This garden variety application of Rule 52(a) raises no issue worthy of review by the Court.

employer's overtime policy by beginning work after the policy has been implemented. Pet. App. 7a-8a.

Before focussing on the existence and effect of these agreements, however, the Ninth Circuit carefully defined their relevance. First, it emphatically rejected the County's position that such agreements were dispositive. Pet. App. 7a n.5. Second, it held that such agreements were relevant "in determining whether the parties characterized the time spent waiting on-call as actual work." Pet. App. 8a. Third, it limited the scope of this holding by emphasizing that agreements are only relevant if there is otherwise serious doubt as to whether on-call time was work. As the court explained:

> "Our emphasis of the parties' agreements as a predominant factor is not intended to suggest that agreements are controlling regardless of the character of the uncompensated time at issue. The Supreme Court stated in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), that the FLSA was not designed to perpetuate contracts pursuant to which employers fail to compensate employees for work. The Court in that case noted that there was no uncertainty that the uncompensated time at issue . . . was actually work. However, it specifically noted that it was not addressing a situation where there were 'serious doubts as to whether certain activity or non-activity constituted work or employment.' In such a situation, the parties' agreements are persuasive evidence of whether they intended to define the activity or non-activity as work. Unlike the uncompensated time at issue in *Muscoda*, there is uncertainty whether on-call waiting time is actual work, and consequently, inquiry into the parties' characterization of on-call waiting time is necessary." (Pet. App. 8a (citations omitted))

After conducting that inquiry, the Ninth Circuit found that "Sonoma County's overtime compensation policy was

pursuant to agreements between the parties." Pet. App. 9a. First, the Memorandum of Understanding (MOU) between the County and Petitioners' bargaining representative "does not provide compensation for on-call waiting time." *Id.* Second, "three of the [Petitioners] expressly agreed to [the] County's overtime compensation policy by accepting employment after the policy had been implemented in 1982." *Id.* Third, the remaining coroner constructively agreed to the policy by continuing to work for nine years after the overtime policy was implemented. *Id.* Finally, the court rejected Petitioners' claim that they had protested the County's policy rather than acquiescing in it, because the purported protest occurred only once, involved only two of the four Petitioners, and was directed at the amount of overtime rather than the lack of on-call compensation. *Id.* at 11a.

The Ninth Circuit thus found that both of the predominant factors identified in *Owens*—the employees' ability to use time for their own personal pursuits and the agreements between the parties—"weigh in favor of reversing the district court." Pet. App. 20a. It therefore held that "the time that coroners spend waiting on-call for actual work is not compensable under the FLSA." *Id.*

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT EXPAND THE PERMISSIBLE SCOPE OF APPELLATE REVIEW IN FLSA CASES.

Petitioners' claim that the decision below "weakens the division of authority between trial courts and appellate courts" (Pet. 10) rests on three distinct bases. First, Petitioners contend that the Courts of Appeals have issued conflicting decisions as to whether on-call compensability is a question of law or of fact. Second, Petitioners assert that, as a matter of federal judicial policy, determinations of compensability should be treated as factual questions

resolved by the District Courts. Third, Petitioners contend that the decision below violates Rule 52(a). None of these arguments justifies granting the writ.

A. There Is No Inter-Circuit Conflict Regarding The Permissible Scope Of Review In On-call Cases.

Fact-finding in FLSA cases is governed by the same principles which govern fact-finding "in other civil bench-tried litigation in federal courts." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986). If there is no triable issue of material fact, summary judgment is appropriate. FED. R. CIV. P. 56. If a reasonable jury or trial court could only reach one result, judgment should be entered as a matter of law under Rule 50. And unless the district court's factual findings are clearly erroneous, they may not be set aside. FED. R. CIV. P. 52(a).

The cases which Petitioners claim pose a conflict with the decision below do nothing more than apply these well-settled principles of law. None of these cases holds that on-call compensability must *always* be decided by a trier of fact, no matter how thin the evidence on one side, just as none of them holds that compensability may *never* be determined by an appropriate fact-finder. Instead, these cases have simply applied the usual rules governing resolution of factual issues by the federal courts to the differing circumstances of each case.

For example, Petitioners assert that *Henson v. Pulaski County Sheriff Department*, 6 F.3d 531 (8th Cir. 1993), stands for the proposition that "the compensability of on-call duty is a fact question that cannot be resolved as a matter of law." Pet. 10. But *Henson* neither states nor applies any such ironclad rule. Indeed, in one of the two appeals consolidated in *Henson*, the Eighth Circuit *affirmed* the trial court's grant of summary judgment, holding that the employer was entitled to judgment "as a matter of law" because the restrictions imposed on the employees "could not support a finding that [they] spend their meal breaks predominantly for the benefit of their employer." 6 F.3d at

536. In contrast, summary judgment was reversed in the other appeal consolidated in *Henson*, where the court could not say as a matter of law whether the employees used their meal times predominantly for their benefit. *Id.* at 537. *Henson* thus stands for nothing more than the wholly unremarkable proposition that factual issues may be decided summarily where a reasonable fact-finder could reach only one result, while such adjudication is inappropriate if the evidence is in conflict.

The remaining cases cited by Petitioners are simply variations on this familiar theme. *Cross v. Arkansas Forestry Commission*, 938 F.2d 912, 916-17 (8th Cir. 1991), holds only that an employer is not entitled to summary judgment where a reasonable jury could find that the employer's policy "sufficiently restricted [the employees] from using their time for personal pursuits." *Id.* at 917. Conversely, *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991), *cert. denied*, --U.S.--, 116 L. Ed. 2d 786 (1992) merely holds that summary judgment *is* appropriate where "the undisputed facts show that the on-call time is not working time." *Id.* at 675. And *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992), holds only that JNOV may be granted where, accepting all the plaintiffs' facts as true, their on-call time "was not used predominately for the employer's benefit." *Id.* at 808.

These cases do not conflict with the decision below. This case does not involve summary judgment, JNOV, a non-suit, or any of the other devices trial courts use to decide undisputed factual issues. Conversely, none of the cases cited by Petitioners involves Rule 52(a). Consequently, none of them supports review of the Rule 52(a) issue this case purportedly presents.[6]

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[6]In Part I(C), below, we address Petitioners' claim that the decision below violates Rule 52(a), and show that this contention is neither certworthy nor correct.

Nor do these cases contradict the decisions of this Court. In *Birdwell*, the Eleventh Circuit described the respective roles of judge and jury in an FLSA case by saying: "It is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist." *Id.* at 808. That division of labor is premised on the same distinction between the historical facts and the legal consequences of those facts which this Court articulated in *Icicle Seafoods*:

> "The question of how the respondents spent their working time on board the Arctic Star is a question of fact. The question whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law . . . ." (475 U.S. at 714)

Nor do the cases cited by Petitioners conflict with this Court's statement in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that whether on-call time "falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court." *Id.* at 136-37. As the Fifth Circuit stated in *Bright*, this simply means what no one denies—that FLSA cases are fact-dependent:

> "Taken in context, we believe this language is properly understood as describing the dependency of the coverage question on the particular facts as found in each discrete case, a view that is reinforced to the citation of *Jacksonville Paper Co.*, where the Court approves a remand for new factual findings, observing that '[i]f a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations [citation omitted] the question of the Act's coverage depends on the special facts pertaining to the particular business.'" (934 F.2d at 674-75 n.5 (citation omitted))

Accordingly, as the Fifth Circuit held, neither *Skidmore* nor the companion decision in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), precludes granting summary judgment or a non-suit in an appropriate case:

> "[T]o state . . . that the particular facts in each case are determinative, is not to say that where those discrete facts are found the resulting categorization as working or nonworking time is also necessarily always a factual rather than a legal question. Indeed, *Skidmore* expressly recognizes that '[f]acts may show that the employee was engaged to wait, or they may show that he waited to be engaged.' Obviously, the Court does not mean that the *same* set of facts may lead to different results, but rather that the different facts of discrete cases may produce different results." (*Bright*, 934 F.2d at 674-75 (citation and footnote omitted))

No case cited by Petitioners disagrees with this analysis, or contends that the principle which differentiates between factual issues and the legal consequences of those facts does not apply in FLSA cases. The conflict Petitioners see is illusory.[7]

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[7]Petitioners also argue that the Ninth Circuit in this case made the same mistake that the lower courts did in *Skidmore* when it held that Petitioners engaged in too many personal activities while on-call for that time to be considered work. Pet. 12. This is incorrect. The lower courts in *Skidmore* held that on-call time was not work as a matter of law if employees could engage in *any* personal pursuits while on-call (323 U.S. at 140), even if the employees were restricted to the area immediately around their employer's premises. *Id.* at 136. Here, by contrast, the Ninth Circuit invoked no "all or nothing" rule. It simply held that, on the facts of this case, Petitioners' on-call time was not compensable where they could use that time to engage in a wide variety of personal pursuits, either at their own homes or throughout the County.

B. The District Courts Should Not Be Given The Exclusive Role In Deciding FLSA Cases.

As a fall-back to their conflict argument, Petitioners argue that whether a given set of on-call requirements constitutes work must be determined by the District Courts as a question of fact, rather than by the Courts of Appeals (and, ultimately, this Court) as a matter of law. Petitioners' argument conflicts with *Icicle Seafoods*, where the Court explicitly recognized that whether a specific set of facts gives rise to liability under the FLSA is a legal issue for the appellate courts:

> "The question whether [the employees'] particular activities excluded them from the overtime benefits of the FLSA is a question of law. . . . If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment." (475 U.S. at 714)

Moreover, the regime envisioned by Petitioners—in which District Court findings regarding compensability would be largely unreviewable—has nothing to recommend it. If compensability is purely a factual question, then two fact-finders may reach opposite conclusions on the same set of facts, and the appellate courts will be powerless to intervene unless one determination was clearly erroneous. *See Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985) (Court of Appeals could not reverse District Court's finding where neither the trial court's interpretation of the facts nor that of the appellate court was illogical or implausible). In that event, the FLSA will not only mean one thing in California and another in Alabama (which Petitioners assert is desirable!), its interpretation will also vary from one courtroom to the next within the very same jurisdiction, and no appellate court will be able to impose uniformity due to the strictures of Rule 52(a).

Such balkanization of federal labor law is both unwise and unnecessary. In enacting the FLSA, "Congress intended . . . to achieve a *uniform national policy* of guaranteeing compensation for all work or employment . . . covered by the Act." *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 741 (1981) (emphasis added). That uniform national policy promotes compliance with the Act by providing employers with an evolving "appellate consensus" (Pet. 12) governing entitlement to on-call compensation. Conversely, both uniformity and predictability will be a thing of the past if enforcement of the FLSA comes to depend on the vagaries of fact-finding by individual judges and juries.[8] Meaningful appellate review under uniform national principles of law is the only way to prevent FLSA jurisprudence from becoming "a crazy-quilt of *ad hoc* judgments about dissimilar configurations of fact." Pet. 13.[9]

Moreover, Petitioners err in asserting that "[t]he appellate courts do not have the expertise or the authority to make judgments about the acceptable limits of work and leisure as a matter of national law." *Id.* "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957). A federal judiciary accustomed to setting the economic "rules of the road" under the Sherman Act or deciding whether a new invention is too "obvious" under the prior art to be patentable surely has the expertise

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[8]Although this case involved a bench trial, many cases involving claims for on-call compensation are submitted to juries. *See, e.g., May v. Arkansas Forestry Comm'n*, 993 F.2d 632, 634-35 (8th Cir. 1993).

[9]As this Court noted in *Barrentine*, employers who violate the Act may incur substantial liability, in the form of "actual and liquidated damages, reasonable attorney's fees, and costs." 450 U.S. at 745. (Indeed, the total judgment in this case, which involved only four employees and did not include liquidated damages, amounted to more than $400,000.) Given such penalties, employers have a strong and entirely legitimate interest in the development of a "federal common law" interpreting the Act's rather general commands.

to determine whether overtime is compensable under the FLSA. Indeed, what the Court said about the judicial determination of "obviousness" under the patent law is equally true here:

> "What is obvious is not a question upon which there is likely to be uniformity of thought in every given factual context. The difficulties, however, . . . should be amenable to a case-by-case development." (*Graham v. John Deere Co.*, 383 U.S. 1, 18 (1966))

Indeed, the very case law canvassed by Petitioners indicates that the appellate courts are up to the task of deciding on-call cases in a principled way. As Petitioners themselves note, the appellate courts are in the process of developing a consensus as to how on-call compensability is affected by such factors as the employer's required response time, the geographical restrictions imposed on employees, and the employees' use of a pager. Pet. 12. The fact that "case-by-case development" in this area may lead to "ever-more-delicate analogies and distinctions between different work environments" (Pet. 13) indicates that the process is working, not that it should be junked.[10]

Nor are Petitioners correct in arguing that the case-by-case adjudication of on-call cases has led to conflicts. As the Ninth Circuit stated, this case "can be easily distinguished from *Renfro [v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991), *cert. dismissed*, --U.S.--, 117 L. Ed. 2d 510 (1992)]." Pet. App. 19a. For example, in that case, the firefighters had to report to the fire station within twenty

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[10]Petitioners also claim that the appellate courts are incapable of appreciating geographical nuances between cases, because they are not versed in the "milieu" out of which the cases arise. Pet. 11. But local customs are largely irrelevant to determining the FLSA's reach. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 166-67 (1945). And the idea that federal appellate judges are too dense to understand that pagers may work better in a flat metropolitan area than in hilly Sonoma County (Pet. 12) is unworthy of response.

minutes of being summoned (948 F.2d at 1532), while Petitioners in most instances may conduct their investigations by telephone. *See* pp.3-4, *supra*. Consequently, as the Court of Appeals recognized, the burden each interruption imposes on Petitioners is "substantially different than being required to return to the employer's premises within twenty minutes." Pet. App. 15a.[11] Moreover, as the Ninth Circuit also pointed out, there are numerous other factual differences between this case and *Renfro*, differences which destroy Petitioners' claim of conflict. Pet. App. 19a.[12]

C. The Decision Below Does Not Violate Rule 52(a).

Petitioners' claim that the Ninth Circuit violated Rule 52(a) is neither cert-worthy nor correct. As Petitioners tacitly concede, this Court's decision in *Icicle Seafoods* defines "the appellate court's proper role in FLSA disputes over the character of work." Pet. 15. Absent a conflict among the Circuits (which does not exist), there would be no reason for this Court to revisit this issue now even if the decision below were erroneous.

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[11]Similarly, the on-call restrictions to which Petitioners are subject are far less onerous than those imposed in cases where the employees have to remain on the employer's premises. Yet even there on-call compensation has often been denied. *See, e.g., Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1248-49 (5th Cir. 1986), *cert. denied*, 484 U.S. 827 (1987).

[12]For example, the firefighters in *Renfro* could not go out of town, due to the twenty-minute required response time. *See* 948 F.2d at 1532. In contrast, Petitioners are free to travel anywhere within the 1,600 square miles of Sonoma County, as long as they are reachable by telephone or pager. Pet. App. 42a-43a.

Moreover, contrary to Petitioners' assertion, the District Court held this case similar to *Renfro* in only one respect: the frequency with which Petitioners were called. Pet. App. 37a. The other references in the Petition to the District Court's purported reliance on *Renfro* summarize either the facts of that case (Pet. App. 32a, 42a) or the parties' contentions about its applicability (Pet. App. 32a, 48a).

But the decision below is not erroneous. In the first place, the Ninth Circuit accurately set forth the applicable standards of review:

> "We review the district court's findings of fact for clear error and its interpretation of the FLSA *de novo*. Whether and to what extent employees are able to use on-call time for personal activities is a question of fact. However, whether the limitations on the employees' personal activities while on-call are such that on-call waiting time would be considered compensable overtime under the FLSA is a question of law which we review *de novo*." (Pet. App. 6a-7a (citations omitted))

Moreover, the Court of Appeals carefully applied these standards to the District Court's findings. Petitioners do not contend that the Court of Appeals violated Rule 52(a) in its discussion of the second *Owens* factor, the agreements between the parties. Nor do they contend that the rule was violated with respect to several of the issues mentioned in *Owens* as bearing upon the employees' degree of personal freedom.[13] Accordingly, our analysis focusses on the specific sub-issues Petitioners have (mistakenly) identified as violations of Rule 52(a). As we shall see, in each instance, Petitioners' entire argument rests on a mischaracterization of the Ninth Circuit's decision:

- The Ninth Circuit did *not* find that the "frequency of calls" was one every 6.45 hours. Pet. 14.

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[13]The first two of the sub-issues mentioned by *Owens* in determining whether an employee has use of his or her on-call time for personal purposes are "whether there was an on-premises living requirement" and "whether there were excessive geographical restrictions on [the] employee's movements." 971 F.2d at 351. It is undisputed that Petitioners were not subject to an on-premises living requirement. Nor do Petitioners contest the Court of Appeals' treatment of the District Court's finding that Petitioners were allowed to travel on call anywhere within Sonoma County as long as they were "within fifteen or twenty minutes of a telephone or two-way radio, which each plaintiff had in his County vehicle." Pet. App. 43a.

Instead, it held that this statistic summarized the frequency of *death reports*. *See* note 5, *supra*. In finding the District Court's contrary finding on this subject "implausible," the Ninth Circuit simply meant that it was clearly erroneous under Rule 52(a). *See Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985) (district court findings that are not illogical or implausible are protected by Rule 52(a)).

- The Ninth Circuit did *not* "assert[] that coroners were . . . under no limitations while on call." Pet. 14. The Court of Appeals merely held that the absence of a required response time *to report to the employer's premises* meant that Petitioners were not subject to any meaningful *geographical* limitation (unlike the firefighters in *Renfro*). Pet. App. 19a.

- The District Court did *not* find that three Petitioners could not use pagers. *See* note 4, *supra*. Nor did the Court of Appeals ignore what the District Court *did* find regarding the pagers' reliability. It simply held that, under the legal standards articulated in its prior decision in *Owens*, the trial court should not have focussed on the reliability of the pagers, but instead on their availability. *See* pp.7-8, *supra*.

- The District Court did *not* find that it was difficult for Petitioners to trade shifts. Instead, it found that they voluntarily chose not to do so. Pet. App. 44a-45a. The Court of Appeals, in turn, held that under its prior decision in *Owens*, the proper inquiry regarding trading shifts was whether Petitioners *could* trade shifts, not whether they did so. In finding that they could, the Court of Appeals did not reweigh the evidence, but instead relied on the relevant findings made by the trial court. *See* pp.8-9, *supra*.

Petitioners also misstate the law when they argue that the Court of Appeals violated Rule 52(a) in holding that

Petitioners were not entitled to on-call compensation under the FLSA. While Petitioners call this an "ultimate fact" protected by Rule 52(a), it is not. *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 743 (1981) (while arbitrators possess the expertise necessary to decide "preliminary factual questions," they lack the competence to decide "the ultimate *legal issue* whether an employee's right . . . to overtime pay under the statute has been violated") (emphasis added). As long as the Court of Appeals did not rewrite the District Court's factual findings (which it did not), it was free to determine *de novo* the legal significance of those findings. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). And even if the trial court's ultimate conclusion that Petitioners' use of on-call time was sufficiently restricted so as to require compensation under the FLSA might under some circumstances be a finding of fact protected by Rule 52(a), that rule does not apply where a trial court's finding is "predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 501 (1984). That is precisely what occurred here, where (as the Ninth Circuit held), the District Court's analysis of the facts was inconsistent with the legal principles subsequently recognized by that court in *Owens*. *See* Pet. App. 6a ("*Owens* controls our decision in this case").

II.

THE DECISION BELOW DOES NOT HOLD THAT PETITIONERS WAIVED THEIR FLSA RIGHTS.

Petitioners' second purported reason for granting the writ rests on the same sort of misstatement of the record as their first. Contrary to the implication of the second "question presented," the Ninth Circuit did not hold that Petitioners' FLSA rights were waived by a collective bargaining agreement, nor was the Court of Appeals' discussion of the parties' agreements an "alternative ground" (Pet. 16) for reversal. What the Ninth Circuit actually held was far more modest, and is fully consistent

with the decisions of both this Court, the Courts of Appeals, and the applicable FLSA regulations.

Instead of focusing exclusively on the Memorandum of Understanding between Petitioners' employee association and the County, the Ninth Circuit identified "three different types of agreements between the employer and employees which may be relevant to the issue of on-call compensation." Pet. App. 7a. These include applicable collective bargaining agreements, a constructive agreement if employees are informed of the overtime compensation policy, and an express agreement if the employees voluntarily accept the employer's overtime policy by beginning work after the policy has been implemented. *Id.* at 7a-8a. The Court of Appeals also held that these agreements are *not* dispositive (*id.* at 7a n.5), and are relevant *only* where there is otherwise serious doubt as to the applicability of the FLSA. *Id.* at 8a. Even in such cases, the parties' agreements do not waive rights under the FLSA; instead, they are only evidence of "whether [the parties] intended to define the activity or non-activity as work." *Id.*

This holding does not conflict with this Court's rulings that FLSA rights cannot be waived. The very same decisions which established the principle that contract or custom cannot waive FLSA rights simultaneously recognize that evidence of custom or contract *is* relevant "to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 170 (1945); *see Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944). Indeed, the District Court in this case candidly conceded that "[t]he Supreme Court, in both *Jewell Ridge* and *Tennessee Coal*, went to great lengths to distinguish the facts . . . from those present in the . . . 'waiting time' or 'on-call' cases" such as *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). *See* Pet. App. 53a. *Jewell Ridge* and *Tennessee Coal* thus did not disturb this Court's holding in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that among the

facts relevant to determining whether on-call time falls within the FLSA are "the agreements between the particular parties" and "appraisal of their practical construction of the working agreement by conduct." *Id.* at 137.[14]

This rule accords with the regulations interpreting the FLSA issued by the Department of Labor. 29 C.F.R. §785.14 (1993) quotes this precise language from *Skidmore* in illustrating the rule that "[w]hether waiting time is time

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[14]For similar reasons, there is no conflict between the decision below and the other Court of Appeals decisions cited by Petitioners. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507 (9th Cir. 1978), simply holds that a collective bargaining agreement cannot waive an employee's unquestioned right under the FLSA to be paid overtime when he or she works more than forty hours in a week. *Id.* at 513-14. *Wethington v. City of Montgomery*, 935 F.2d 222 (11th Cir. 1991), holds that if a particular pay scheme does not violate the Act when embodied in a collective bargaining agreement, it does not violate the Act when the employer adopts it unilaterally. *Id.* at 229. Neither *Lerwill* nor *Wethington* is even an on-call case, much less one where the agreements of the parties were used to determine whether the employer's restrictions turned on-call time into work.

Nor is there any conflict between the decision below and *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). Contrary to Petitioners' assertion, the Ninth Circuit in this case did not hold that the employees' "subjective characterization" of their work (Pet. 18) determines FLSA coverage. Instead, the Court of Appeals looked at the employees' conduct, not their words. That is exactly what this Court did in *Tony & Susan Alamo Foundation*. In that case, the employees stated that they were "volunteering" their services to a religious ministry's commercial enterprises and hence were not "employees" covered by the FLSA. *Id.* at 300. In rejecting this claim, the Court relied on the District Court's finding that the employees' own conduct indicated that they expected to receive in-kind benefits in exchange for their services. *Id.* at 301-02. Similarly, the decision below relied on the employees' conduct in determining the scope of FLSA coverage. The decision below therefore does not conflict with *Tony & Susan Alamo Foundation*.

Livadas v. Bradshaw, –U.S.–, 129 L. Ed. 2d 93 (1994), is even further afield. That case invalidated a state policy of refusing to enforce certain statutes regulating the payment of wages where the employees were covered by a collective bargaining agreement. That case did not involve any question of waiver, and neither does this one.

worked under the Act depends upon particular circumstances." *See* Pet. 3 (quoting regulation).[15]

It also accords with common sense. If on-call time really imposed an onerous burden on Petitioners, one would expect them to protest the imposition and their employee association to vigorously demand at least some compensation for time spent on-call. But none of this happened. Two Petitioners never protested at all, while the remaining two filed a protest that did not even address the lack of overtime compensation. Pet. App. 11a. All of the Petitioners eagerly sought the generous benefits provided by the County under its existing overtime policy, including the opportunity to earn an hour or two of overtime for making a five-minute telephone investigation. *See id.* at 4a-5a. Indeed, they volunteered to work as coroners in part because of the opportunity to earn overtime under the policy they now attack, and the more senior members chose shifts with the most on-call time. *Id.* at 53a. Petitioners' employee association voluntarily *surrendered* the coroners' pre-existing contractual entitlement to on-call compensation.[16] Such conduct, while not dispositive, nevertheless undermines Petitioners' claim that the restrictions imposed on their use of on-call time are so restrictive as to require overtime pay under the FLSA.

The fact that agreements are only evidentiary, rather than dispositive, disposes of Petitioners' concerns. Indeed, Petitioners' fear that union weakness at the bargaining table

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[15]While not controlling, regulations interpreting the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

[16]"Prior to 1982, coroners were paid 5% of their hourly pay for each hour on-call." Pet. App. 53a. In that year, however, the employee association agreed to an MOU that eliminated this supplement. (While the same agreement gave the coroners a "5% premium" in their hourly pay (*id.*), the trial court specifically found that "the 5% premium was not part of the parties' agreement regarding on-call compensation." *Id.* at 56a.)

will lead to surrender of employees' FLSA rights is based only on their own misreading of the decision below. If a collective bargaining agreement, or an individual employee's acquiescence in the employer's overtime policy, is merely the result of "superior bargaining power" (Pet. 18) or the employee's fear that protests will be punished, the employee can offer proof of that fact and that proof, if accepted, will render the agreements irrelevant. Indeed, the Ninth Circuit in this case considered and rejected several arguments made by Petitioners which attempted to discount the evidentiary value of the agreements. Pet. App. 10a-11a. If, conversely, the employees' own conduct—or that of their association—indicates that on-call restrictions are not onerous, the parties' agreements *are* relevant to determining whether the employees can use that time for their own benefit. The Ninth Circuit's decision reaffirming this principle raises no issue worthy of review.

CONCLUSION

The petition should be denied.

DATED: January 9, 1995.

Respectfully,

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